



King's Research Portal

DOI:

[10.1093/indlaw/dwx008](https://doi.org/10.1093/indlaw/dwx008)

Document Version

Peer reviewed version

[Link to publication record in King's Research Portal](#)

Citation for published version (APA):

Mcgaughey, E. (2018). Votes at Work in Britain: Shareholder Monopolisation and the 'Single Channel'. *INDUSTRIAL LAW JOURNAL*, 47(1), 76-106. <https://doi.org/10.1093/indlaw/dwx008>

Citing this paper

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

General rights

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.

VOTES AT WORK IN BRITAIN: SHAREHOLDER MONOPOLISATION AND THE ‘SINGLE CHANNEL’

Ewan McGaughey*

Abstract

Why do shareholders monopolise voting rights in UK companies, and are trade unions the only way to get meaningful workplace representation? In 1967 a Labour Party policy document first coined the phrase that a ‘single channel’ for representation should ‘in the normal’ case mean trade unions. Since then, it has been said the labour movement embraced an ‘adversarial’ rather than a ‘constitutional’ conception of corporations, neglecting legal rights to worker voice in enterprise governance. This article shows that matters were not so simple. It explains the substantial history of legal rights to vote in British workplaces, and competition from the rival constitutional conception: employee share schemes. The UK has the oldest corporations – namely universities – which have consistently embedded worker participation rights in law. Britain has among the world’s most sophisticated ‘second channel’ participation rights in pension board governance. Developing with collective bargaining, it had the world’s first private corporations with legal participation rights. Although major plans in the 1920s for codetermination in rail and coal fell through, it maintained a ‘third channel’ of worker representatives on boards during the 20th century in numerous sectors, including ports, gas, post, steel, and buses. At different points every major political party had general proposals for votes at work. The narrative of the ‘single channel’ of workplace representation, and an ‘adversarial’ conception of the company contains some truth, but there has never been one size of regulation for all forms of enterprise.

Contents

1. INTRODUCTION ... 1

2. VOTES AT WORK IN BRITAIN ... 4

- (1) Let’s ‘put this differently’ ... 7 ~ (2) Voluntarism and share schemes ... 10 ~
(3) ‘What the state has not given’ ... 15 ~ (4) Sharing success? ... 21

3. CONCLUSIONS ... 25

1. INTRODUCTION

The ‘single channel’ is a familiar narrative in UK labour law. It says that next to collective bargaining ‘there were no significant competing functions’ of worker representation.¹ A ‘second’ channel of work councils, and a ‘third’ channel of votes for boards of directors did not exist because there were ‘deep-rooted adversarial conceptions’ in collective bargaining, which idealised an ‘adversarial rather than a constitutional’ conception of company law.² This narrative had divided politicians and unions, because some said trade

* Lecturer in Private Law, King’s College, London and Research Associate, Centre for Business Research, University of Cambridge. My thanks to David Kershaw, Marc Moore, Paul Davies, Hugh Collins, Nicola Countouris, Janet Williamson and Mark Freedland for previous discussions or comments, and my especial thanks for comments from three anonymous referees. Please email ewan.mcgaughey@kcl.ac.uk for discussion.

¹ PL Davies and C Kilpatrick, ‘UK Worker Representation after Single Channel’ (2004) 33 ILJ 121, which argues the UK passed the opportunity to make a ‘vibrant, harmonious and effective system of worker representation’ because it was wedded to a single channel, even if it was clear that elected but non-union representation was better than none.

² B Clift, A Gamble and M Harris, ‘The Labour Party and the Company’ in JE Parkinson, A Gamble and G Kelly, *The*

unions should remain the ‘single channel’, for boards of public bodies,³ on boards of large companies,⁴ or in other work councils.⁵ Today it is clear, binding rights to vote on specific issues and consultative work councils are spreading, and general proposals for worker votes for company boards have re-entered mainstream debate.⁶ But also, the view that Britain has always had an ‘adversarial’ and ‘single channel’ system is not so simple.⁷

This article uncovers the remarkable history of votes at work in Britain. It poses two main questions. First, were British labour relations ever as simple as a ‘single channel’ narrative would suggest? This phrase was originally used in a 1967 Labour Party policy document to endorse integrating voice through trade unions with representation in public corporations.⁸ Afterwards, it became an object of concern.⁹ Ironically, most of the very people writing about the ‘single channel’ got votes in the corporations they worked for, namely at universities.¹⁰ The UK probably had the world’s first systems of votes at work in public and private corporations,¹¹ and through the 20th century workers voted for boards in ports, gas companies, the post, steel, and buses. It has an advanced system of ‘second channel’ participation in occupational pensions.¹² At various times, every major political party proposed worker votes in corporate governance.¹³ While a sizeable literature discusses

Political Economy of the Company (Hart 2000) ch 3, 53-54 and 68.

³ Labour Party, National Executive Committee, *Industrial Democracy* (1967) 10-11, but note that the concept of a ‘single channel’ here referred to *combining* union and board representation rather than adding to it. Unlike later usage, this early document saw consultation alongside unions as a potentially costly and disorganised ‘two-channel approach’.

⁴ Alan Bullock, *Report of the committee of inquiry on industrial democracy* (1977) Cmnd 6706.

⁵ See *Commission v UK* (1994) [C-382/92](#), [48]-[51] and PL Davies, ‘A Challenge to Single Channel?’ (1994) 23 ILJ 272, 284, suggesting the Whitley Reports of 1917 established the single channel principle by rejecting consultation rights without unions, though as part 2(1) shows there were many exceptions.

⁶ e.g. J Pickard, ‘Theresa May vows corporate crackdown on ‘privileged few’ (10 July 2016) Financial Times.

⁷ The view of Davies (1994) 23 ILJ 272, 277, that the single channel was a ‘largely unchallenged principle’ is obviously nuanced. As we know, the point of a ‘principle’ is that it admits exceptions.

⁸ National Executive Committee, *Industrial Democracy* (Labour Party 1967) 10-11, ‘in the normal case the workers’ representatives in the plant would be trade unionists... what is now defined as bargaining and what is now defined as consultation would in future be dealt with in a single channel... The existence of two channels of communication and discussion between management and workers gives rise to a number of persistent problems, many of which remain even with goodwill on both sides.’ It goes on to list problems of coordination, training and unsupported representatives being weaker against management.

⁹ e.g. P Davies, ‘Bullock Report and Employee Participation in Corporate Planning in the U.K.’ (1978) 3(1) *Journal of Comparative Corporate Law and Securities Regulation* 245, 253.

¹⁰ e.g. Oxford University Act 1854 [ss 16 and 21](#), Cambridge University Act 1856 [ss 5-51](#), *Memorandum and Articles of Association of the London School of Economics and Political Science*, art 10.5, Statutes of the University of Warwick, Charter and Statutes, Second Schedule 1, [para 12](#), etc.

¹¹ Port of London Act 1908 [s 1\(7\)](#), preceding the German Aufsichtsratsgesetz 1922, or in the US, in Massachusetts, An Act to enable manufacturing corporations to provide for the representation of their employees on the board of directors (3 April 1919) Chap. 0070.

¹² Pensions Act 2004 ss 241-243, following Roy Goode, *Pension Law Reform* (1993) Cm 2342, para 4.5.19, ‘however scrupulous the employer may be, there is no substitute for the discipline of another voice in the decision-making process, who can ensure that the employer-appointed trustees do not allow themselves, consciously or unconsciously, to be unduly influenced by the wishes and concerns of the employer.’

¹³ To give just three examples, a Conservative government introduced the South Metropolitan Gas Act 1896. The

votes in worker co-operatives¹⁴ (either in trusts, or partnerships), this article focuses on lesser known legal development in votes at work in corporations, both public and private.

Second, is the lack of votes at work ‘best understood as reflecting deep-rooted adversarial conceptions of the company within the Labour movement’? Clift, Gamble and Harris have forcefully argued this adversarialism linked with a ‘weakness of constitutional thinking’ about company law.¹⁵ But if that were true, the deeper-rooted question was, what did adversarialism really mean and why was it there? A powerful, less discussed, constitutional conception did exist. But it challenged the idea of votes at work without capital: investment of *property* was needed for votes in companies, and workers only had an employment *contract*. Rooted in 19th century visions of politics, investors of labour had contractual wage claims and no more. If people wanted votes at work, they could buy shares and, it was said, government might promote employee share schemes. Trade unions became averse to share schemes because without money, workers could not buy votes. And without votes at work, workers could get little money. This was a vicious circle of logic, a catch-22. It pushed unions to stick with collective bargaining, and it pushed the idea of votes at work into an unhappy partnership with public ownership, where there would be no shareholders. But now, it appears this formalist thinking has changed.

Because 72 per cent of employees are not covered by collective agreement,¹⁶ most people today no longer see the ‘single channel’: their voice at work is muted. However, as the map below shows, general codetermination laws have now spread to a majority of EU countries,¹⁷ as well as Norway. Consistent with historical practice in the UK and Europe,¹⁸ the labour movement has pressed for votes at work through collective agreements, and

Liberal Party had an official codetermination policy with *The Report of the Industrial Partnership Committee: Partners at Work* (1968), and the Labour Party commissioned the *Report of the committee of inquiry on industrial democracy* (1977) Cmnd 6706. Details of all are discussed below.

¹⁴ e.g. R Owen, *The crisis: and national co-operative trades’ union gazette* (11 January 1834) [vol III](#), no 20. See generally R Miliband, ‘The Politics of Robert Owen’ (1954) 15(4) *Journal of the History of Ideas* 233. Owen believed in ‘mutual confidence and kindness’ between employee and employer. Even as the first trade union confederation leader he was sceptical of ‘petty proceedings about strikes for wages’.

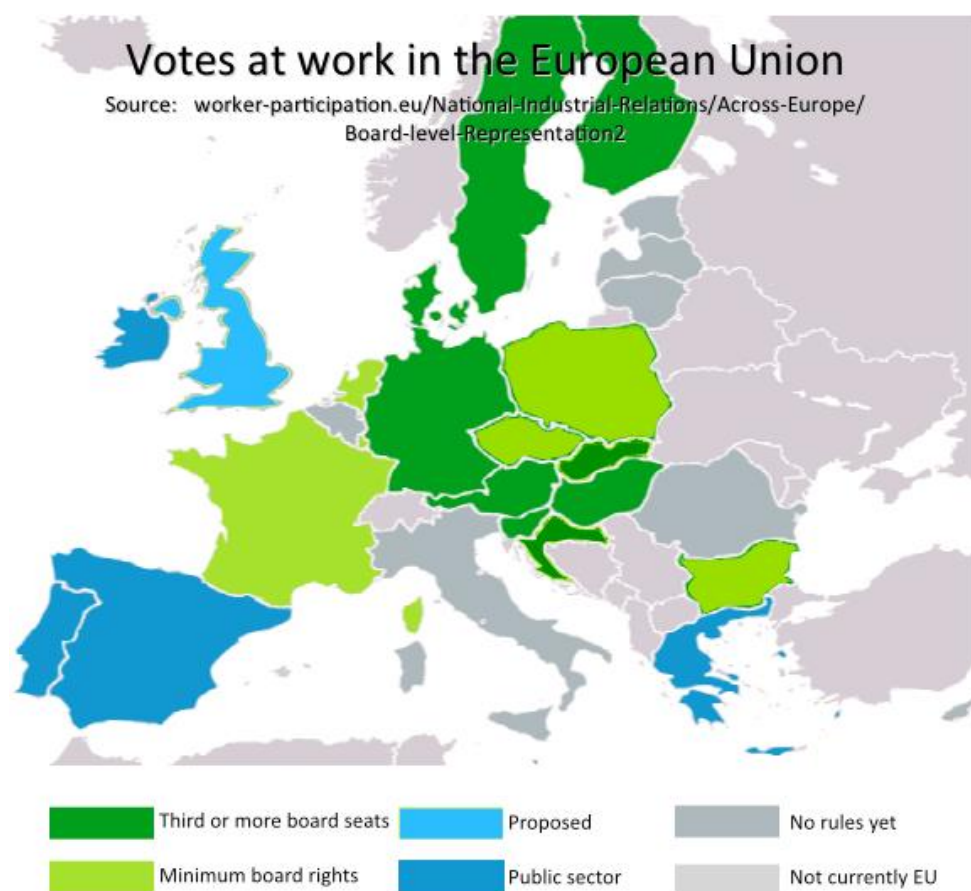
¹⁵ Clift, Gamble and Harris (2000) ch 3, 81.

¹⁶ See DBIS, *Trade Union Membership 2014: Statistical Bulletin* ([June 2015](#)) 34, Table 1.1.

¹⁷ In private companies, 15 out of 28 EU member states have codetermination laws. Belgium, Cyprus, Estonia, Italy, Latvia, Lithuania, Romania, and the UK had no general law. Greece, Malta, Spain, Portugal and Ireland had it in the public sector. France, Luxembourg, Netherlands, Slovakia and Croatia had under one third in private companies (sometimes voluntary) depending on size. Germany has sub-parity codetermination on supervisory boards. Austria, Czech Republic, Denmark, Hungary, and Slovenia fix one third of boards (some supervisory, some unitary). Sweden, Poland, Bulgaria and Finland have codetermination of around a third of board members (depending again on size).

¹⁸ On pension codetermination in the UK, see E McGaughey, *Participation in Corporate Governance* (2014) ch 6(1)(b) and see E McGaughey, ‘The Codetermination Bargains: The History of German Corporate and Labour Law’ (2017) [23\(1\) Columbia Journal of European Law](#) 135.

sought to codify those practices in law. There are many models, including a minimum percentage of votes in company general meetings with shareholders,¹⁹ and a minimum of directors on boards. This will be seen as necessary because collective bargaining and nationalisation, by itself, has been vulnerable to short-term political change. Worldwide, the labour movement is no longer just seeking temporary bargains, but board seats.²⁰ They seek to socialise, not just ownership today, but the votes in the economy on a lasting basis. History shows there is no one-size-fits-all theory of enterprise, but there are minimum standards, and the right to vote at work is becoming an essential part of a modern economic constitution.



¹⁹ For earlier examples, see South Metropolitan Gas Act 1896 and the Liberal Party, *The Report of the Industrial Partnership Committee: Partners at Work* (1968) discussed below. See now KD Ewing, et al, *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (Institute of Employment Rights, 2016) 23, 3.22.

²⁰ To give just two very small examples, see Hans-Böckler-Stiftung, 'Viva DGB, viva Solidarity' (2009) [Ausgabe 10/2009](#) reporting Sharan Burrow, head of the International Trade Union Confederation saying 'she hoped to see more exporting of codetermination from Germany'. On developments regarding work councils, and legal options, see B Sachs, 'Can a Members-Only Union Validate a Works Council?' (11 July 2014) onlabor.org.

2. VOTES AT WORK IN BRITAIN

The principle of votes at work existed long before most people could vote for Parliament. One of the earliest examples emerged in 1850, shortly after the turmoil of the 1848 revolutions unfolded across the European continent.²¹ With widespread dissatisfaction in universities, the government launched enquiries into their governance. The Oxford University Commission of 1852, hardly a radical body, was determined to reverse ‘successive interventions by which the government of the University was reduced to a narrow oligarchy.’²² Although its statutes were in some disarray, the Commission characterised the university as one which ‘appears to have been at the first an association of teachers united only by mutual interest’.²³ On the Report’s recommendations, the Oxford University Act 1854 sections 16 and 21 set out the composition and a new right of election of ‘fellow’ employees to the Hebdomadal Council. Similarly, the Cambridge University Act 1856 sections 5 and 12 soon required ‘electors’ to have votes for ‘graces’ (plebiscites binding management) and in electing the University Council.²⁴ Often forgotten, these practices spread to most universities and further education institutions throughout the UK today.²⁵ Of course, 19th century universities were hardly ‘workplace democracies’, because non-academic, or less senior staff, might not be enfranchised. Nevertheless, a right to vote came from work.

In those earlier times, the contrast to the vast majority of UK workplaces was stark. Trade unions had only just been legalised, and strikes were still wrongs, as courts asserted their jurisdiction ‘to protect property’.²⁶ The Second Reform Act 1867 had only just reformed the proprietary system of voting for Parliament. Men had votes if they owned a home in a borough worth £10 per annum in rental value, or £12 per annum in counties.²⁷ In this way, possession of property was deemed essential for participation in public life.

²¹ On one of the implications of those, see E McGaughey, ‘The codetermination bargains: the history of German corporate and labour law’ (2017) [23\(1\) Columbia Journal of European Law 135](#).

²² Oxford University Commission, *Report of Her Majesty’s Commissioners appointed to inquire into State, Discipline, Studies and Revenues of University and Colleges of Oxford* (1852) 8. See also P Searby, *A History of the University of Cambridge: Volume III, 1750-1870* (CUP 1997) 518-23 and 530-533, on the parallel report aiming to end the ‘contradictory elements of democracy, anarchy, and oligarchic centralism’.

²³ Oxford University Commission (1852) 7.

²⁴ Oxford University Act 1854 [ss 16 and 21](#) and Cambridge University Act 1856 [ss 5-51](#).

²⁵ e.g. Education Reform Act 1988 ss 124A, 125 and Sch 7A, para 3 and see an example in the *Memorandum and Articles of Association of the London School of Economics and Political Science*, art 10.5.

²⁶ eg *Springhead Spinning Co v Riley* (1868) LR 5 Eq 551, held that an injunction could be granted against a strike because, per Mallins VC, 558, ‘The jurisdiction of this Court is to protect property’.

²⁷ Representation of the People Act 1867 ss 4-6. The Great Reform Act 1832 (2&3 Will IV, c 45) had started the process by standardising voting rules across the country and eliminating the boroughs rules which were too small.

The Companies Act 1862 was drafted so that any person could become a member and have votes without buying shares, and the model constitution of a company known as 'Table A' could be altered to allocate voting rights in any way.²⁸ But the company laws' authors scathed the 'grinding tyranny' of trade unions,²⁹ and courts saw votes as a 'right of property'.³⁰ The dominant presupposition was that workers who only had their labour gave nothing of adequate value for votes: in politics and the economy.

A more progressive view was that, in the words of the political economist John Stuart Mill, everything should be done to promote the 'Partnership principle'.³¹ Mill believed hierarchical employment could be replaced by associations of labour and capitalists, and then worker cooperatives.³² But this 'partnership', in Mill's eyes, involved the death of one of the partners: Mill thought it would be the 'true euthanasia of trade unions'.³³ Apparently unions would be unnecessary if workers had direct votes. As an example, Mill lauded the Yorkshire colliery of Henry Briggs, Son and Co, which in 1865, converted into a limited company, and allowed workers to buy one third of shares. Employees also received a bonus if company profits exceeded 10 per cent of capital. Briggs believed strikes and lockouts, which 'respectable workmen and kind-hearted employers must alike deplore, will be rendered impossible for the future'.³⁴ But Briggs found that not enough people took 'the great and unprecedented opportunity offered'. In 1869, the miners were given the right to elect a director, but in 1875 management sought a wage reduction. Strikes broke out, and the representation plan was dropped.³⁵

Similarly the South Metropolitan Gas Company informally introduced a profit-sharing and share distribution scheme in 1889. It sought a no-strike clause, but this failed

²⁸ See the Companies Act 1862, Table A, art 44, referring to 'Every member shall have one vote for every share up to ten...' The previous Joint Stock Companies Act 1856, Table B, art 38, said explicitly the 'shareholder shall have one vote for every share'... See now CA 2006 s 113(3) requiring a statement of shares held by a member, but not requiring a member to hold shares.

²⁹ Robert Lowe MP, Third Reading of Second Reform Bill, Hansard HC Debs (15 July 1867) col 1546, 'the elite of the working classes you are so fond of, are members of trades unions... founded on principles of the most grinding tyranny not so much against masters as against each other... it was only necessary that you should give them the franchise, to make those trades unions the most dangerous political agencies that could be conceived'. J Micklethwait and M Wooldridge, *The Company* (2003) ch 3, call Lowe 'the father of modern company law'.

³⁰ e.g. *Pender v Lushington* (1877) 6 Ch D 70, per Lord Jessel MR, 'you shall record my vote, as that is a right of property belonging to my interest in this company...'.

³¹ JS Mill, *Principles of Political Economy* (Longmans 1848) [Book V, ch IX](#), §5.

³² Mill (1848) Book IV, ch 7, §4, 'the relation of masters and work-people will be gradually superseded by partnership, in one of two forms: in some cases, association of the labourers with the capitalist; in others, and perhaps finally in all, association of labourers among themselves.'

³³ JS Mill, *Thornton on Labour and Its Claims* (June 1869) [Fortnightly Review](#), Part II

³⁴ HC Briggs, 'To the workmen employed at the Whitwood and Methley Junction Collieries' (1865) LSE Selected Pamphlets, 1-2.

³⁵ DF Schloss, *Methods of Industrial Remuneration* (3rd edn Williams and Norgate 1898) 282.

against the enormous London Dock Strike of 1889. Partly in an attempt to reconcile the workforce, partly out of philanthropic support, and partly to undermine the union,³⁶ the chairman Sir George Livesey procured the South Metropolitan Gas Act 1896.³⁷ If together employees reached a threshold of ordinary shares, they were collectively guaranteed some board seats.³⁸ It was a little more preferential than ordinary shareholdings, but it retained the message that money was needed.³⁹

These theories and experiments were all based on the view that, with the interests of capital and labour aligned, industry would be more productive.⁴⁰ As a young Winston Churchill, speaking in 1897, put it, if ‘the labourer will become, as it were, a shareholder’ then he ‘would not be unwilling to stand the pressure of a bad year because he had shared some of the profits of a good one.’⁴¹ However, workers could hardly agree to risk so much on one business that might well fail – in a way no prudent shareholder would do.⁴² Profit-sharing and co-partnership gained poor reputations because, wrote Sidney and Beatrice Webb, they were ‘taken up by the most reactionary persons’. It was such ‘an attack on, or at least a proposal for the supersession of Trade Unionism, that it aroused the fiercest opposition; and the very idea became anathema in the Trade Union world.’⁴³

(1) LET’S ‘PUT THIS DIFFERENTLY’

The turn of the 20th century was the formative period for labour law as a discipline for two main reasons. First, in 1901 when the House of Lords tried to suppress strikes by making trade unions pay employers for the costs,⁴⁴ a Labour Representation Committee met at Farringdon Hall and resolved to run for Parliament. The new ‘Labour Party’ influenced the Liberal Party enough to pass the Trade Disputes Act 1906, protecting any collective action ‘in contemplation or furtherance of a trade dispute’. Second, labour law’s first textbooks

³⁶ S Webb and B Webb, *A History of Trade Unionism* (Longmans 1920) 403.

³⁷ His view of the scheme is recorded in Sir G Livesey, *Paper on the profit-sharing scheme of the South Metropolitan Gas Company, its history and results* (Co-Partnership Conference of the Labour Association at Newcastle-on-Tyne, October 14th, 1899)

³⁸ South Metropolitan Gas Act 1896 s 19, with over £40,000 of investment, workers could elect one, and then up to three directors, depending on how many ordinary shares were purchased.

³⁹ The Commercial Gas Company and the South Sub-urban Gas Company ran similar schemes until the Gas Act 1948.

⁴⁰ JS Mill, *Principles of Political Economy* (7th edn Longmans 1909) [Book IV, ch 7](#), §5, para 20.

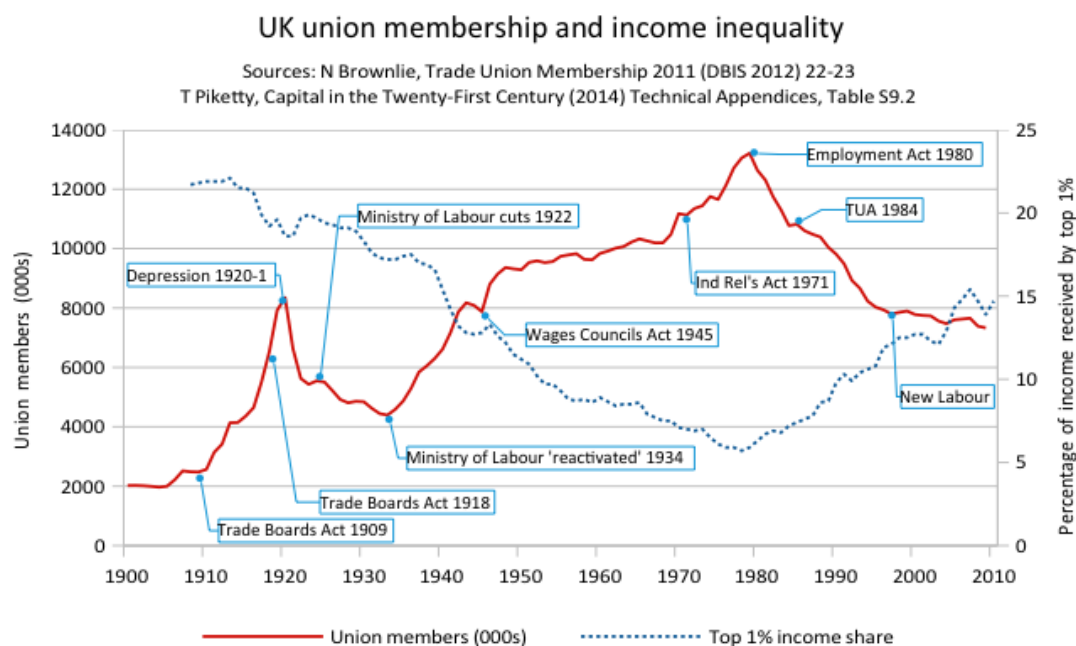
⁴¹ W Churchill, *Speech at Claverton Manor* (26 July 1897) extracted in M Gilbert, *Winston S. Churchill: Youth, 1874-1900, pt. 2. 1896-1900* (Heinemann 1966) 772.

⁴² See Trustee Act 2000 s 4(3)(b). Investment in 20 companies allows 95% of the diversification benefits of a full index portfolio, and 100 companies 99%, see RA Brealey and SC Myers, *Principles of Corporate Finance* (3rd edn 1988) 156.

⁴³ S Webb and B Webb, *A History of Trade Unionism* (Longmans 1920) 653.

⁴⁴ *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426, cf *Allen v Flood* [1898] AC 1.

were written, and teaching began at the London School of Economics.⁴⁵ Initially, the Webbs maintained a theory that workers should stay away from the direction of industry.⁴⁶ Employee share schemes had failed.⁴⁷ Collective bargaining was the true meaning of *Industrial Democracy*. Labour law should create a minimum floor of rights, and collective bargaining ensured fairness beyond the minimum. And indeed, from 1906 with a sympathetic government, union membership expanded rapidly.⁴⁸



The Webbs' initially theorised that workers should abstain from management because there were three functional production decisions. A strict separation of powers was best. Consumers, by market choice, determined 'what to produce'. Management (and by extension shareholders) determined 'how to produce'. And workers, with unions and collective agreements, should settle 'the conditions of production'.⁴⁹ Conflicts of interest 'permanently disqualified' consumers and management or shareholders from controlling

⁴⁵ *Calendar for the London School of Economics and Political Science at London University (1895-1896)* LSE Archives, LSE/Unregistered/27/5. These show a course in 'Commercial and Industrial Law' taught by JEC Munro from 1895, and from 1896 there was 'Problems of Trade Unionism' taught by Sidney Webb. In 1899, a course called 'Problems of Trade Unionism and Factories Legislation' was taught by Beatrice Webb.

⁴⁶ *Royal Commission on Labour (1891-1892)* C 7603 and S Webb and B Webb, *A History of Trade Unionism* (Longmans 1920) 650, 'we find from beginning to end absolutely no claim, and even no suggestion, that the trade union should participate in the direction of industry, otherwise than arranging with the employers the conditions of the wage-earner's working life.'

⁴⁷ S Webb and B Webb, 'Cooperative Production and Profit Sharing' (Special Supplements 1914-1915) *New Statesman*.

⁴⁸ On income inequality, E McGaughey, 'All in 'it' together: worker wages without worker votes' (2016) [27\(1\) KJL 1](#).

⁴⁹ S Webb and B Webb, *Industrial Democracy* (Longmans, Green & Co 1920) [Part III, ch IV, 822](#).

conditions of production, because they would only want cheaper goods, unconcerned by people's living standards. Workers were disqualified from deciding what was produced and how by their less specialised knowledge, and lack of concern for consumer demand.⁵⁰ On the essential question of who determined the distribution of an enterprise's product, there had only to be joint settlement through collective bargaining. The role of workers or their unions was not, initially, in management.⁵¹

Despite this conceptual neatness, a few more worker participation laws had been spreading.⁵² The Coal Mines Regulation Act 1887 required that 'checkweighers', who weighed the amount of coal a worker brought up from the pits, were elected by workers.⁵³ The Port of London Act 1908 section 1(7) may have been the world's first pure board level codetermination law outside universities, even if limited to allowing one worker representative to be appointed to the Port of London Authority's board of directors, in consultation with trade unions.⁵⁴ It was probably written by David Lloyd George,⁵⁵ before he left the Board of Trade for the Exchequer, though its passage through Parliament was completed by Winston Churchill.⁵⁶ Furthermore, in 1915 a joint committee on naval and military pensions was formed with worker representation.⁵⁷ In those ways alone, there was no clear separation of economic powers.

Whether it was these examples, the War, or something else, by 1920 the Webbs decided they should have 'put this differently'. In a new appendix to *The History of Trade Unionism*, the Webbs said circumstances had changed for worker representation in management.⁵⁸ They now approved of the seating of worker or union representatives on boards of companies, and highlighted this as a particularly important goal 'in all publicly

⁵⁰ S Webb and B Webb, *Industrial Democracy* (1920) 818-820.

⁵¹ See also, S Webb and B Webb, *The History of Trade Unionism* (Longmans Green & Co 1920) [ch I, 17](#), 'direction and control... are the special functions of the entrepreneur.'

⁵² The collection put together by W Milne-Bailey, *Trade Union documents* (Bell 1929) is invaluable.

⁵³ Coal Mines Regulation Act 1887 ss 13 and 14. See also Coal Mines (Check Weigher) Act 1894 s 1 (offence to interfere with appointment of a check weigher), Coal Mines (Weighing of Minerals) Act 1905 s 1 (checkweigher cannot be removed except by a ballot of those who appointed) and Coal Mines Act 1911 s 16 (inspectors).

⁵⁴ Port of London Act 1908 s 1(7)

⁵⁵ See his remarks at the Second Reading, Port of London Bill, Hansard HC Debs (6 May 1908) vol 188, [cols 330-331](#).

⁵⁶ HC Debs (23 July 1908) vol 193, cols 342-3.

⁵⁷ Naval and Military War Pensions Act 1915 s 2(2)

⁵⁸ S Webb and B Webb, *The History of Trade Unionism* (1920) [760, Appendix VIII](#), 'The Relationship of Trade Unionism to the Government of Industry. 'In 1920, after nearly a quarter of a century of further experience and consideration, we should, in some respects, put this differently. The growth, among all classes, and especially among the manual workers and the technicians, of what we may call corporate self-consciousness and public spirit, and the diffusion of education coupled with further discoveries in the technique of democratic institutions would lead us today to include, and even to put in the forefront, certain additional suggestions...'

owned industries and services'.⁵⁹ 'The need for final decisions,' they wrote, 'will remain,' but they said they had previously 'confined [them]selves unduly to a separation of spheres of authority'. Along with board level participation, increased consultation through multiple levels of work councils, and consensus based decision making, informed by extended financial and social reporting, was apt to replace 'a great deal of the old autocracy'.⁶⁰

However, the political debate had also moved to a grander scale. In 1917, Sidney Webb had participated in drafting a constitution for the Labour Party. He wrote clause IV, which said that among the party's objects were 'the common ownership of the means of production, distribution and exchange, and the best obtainable system of popular administration and control of each industry or service.' This was not actually a demand to 'nationalise everything', because 'common ownership' did not require the state as an intermediary. Nevertheless, complete nationalisation was to some extent an aim the Webbs supported.⁶¹ Though they had changed their minds, that worker involvement in management could be positive, they conflated this with public ownership of industry. This envisaged one model of governance for all types of enterprise, as if one size might fit all. To socialise power, they thought it necessary to socialise ownership. This remained a basic model of thought in the British labour movement over the 20th century.

(2) VOLUNTARISM AND SHARE SCHEMES

After World War One, the UK was moving closer toward political democracy. The Representation of the People Act 1918 extended the vote for Parliament to all men over 21, but only women over 30 who were married or met further property qualifications.⁶² Rather romantically, at the Bill's second reading, Sir George Cave said,

War by all classes of our countrymen has brought us nearer together, has opened men's eyes, and removed misunderstandings on all sides. It has made it, I think,

⁵⁹ S Webb and B Webb, *The History of Trade Unionism* (1920) 760, 'It is a real social gain that the General Secretary of the Swiss Railwaymen's Trade Union should sit as one of the five members of the supreme governing board of the Swiss railway administration. We ourselves look for the admission of nominees of the manual workers, as well as of the technicians, upon the executive boards and committees, on terms of complete equality with the other members, in all publicly owned industries and services...'

⁶⁰ S Webb and B Webb, *The History of Trade Unionism* (1920) 761.

⁶¹ Their ideas at the time are found in S Webb and B Webb, *A constitution for the socialist commonwealth of Great Britain* (1920) reviewed by JR Commons, 'The Webbs' Constitution for the Socialist Commonwealth' (1921) [11\(1\) American Economic Review 82](#).

⁶² The vote was only equalised by the Representation of the People (Equal Franchise) Act 1928.

impossible that ever again, at all events in the lifetime of the present generation, there should be a revival of the old class feeling which was responsible for so much, and, among other things, for the exclusion for a period, of so many of our population from the class of electors.⁶³

Similar sentiments pushed industrial democracy: looking at constitutionalising the company, as well as collective bargaining, with adversarialism momentarily reduced. But something of that ‘old class feeling’ appeared to remain, and it meant reform happened differently. To begin, the Coal Industry Commission Act 1919 set up a thirteen person commission, with Sidney Webb and the future Lord Chancellor, Justice Sankey, as chair. It considered coal miners’ wages and conditions, industry prices and profits, and whether the future organisation of the mines should continue on the ‘present basis’, or ‘joint control, nationalisation, or any other basis’.⁶⁴ Justice Sankey’s majority report recommended nationalisation, and that workers elect four out of fourteen representatives of proposed District Mining Councils.⁶⁵ These would in turn appoint a National Mining Council according to their mining output, presided over by the minister. An addendum report, from mining representatives and the economist members, emphasised the importance of joint-representation,⁶⁶ and while favouring the broad thrust, supported a draft Nationalisation of Mines and Minerals Bill 1919. Clause 1 envisaged a 21 member Mining Council to run the state enterprise, where ten were appointed by the Miners’ Federation of Great Britain.⁶⁷

A minority report rejected nationalisation. It supported worker votes in pit committees, district and national councils, which boards of directors would consult. But ‘the Executive Authority of the Management should not be impaired’.⁶⁸ The Mining Industry Act 1920 followed the minority report. It allowed advisory committees for

⁶³ Hansard HC Debs (21 May 1917) vol 94, col 2135. Between this and 1867, the Representation of the People Act 1884 had extended the vote to around two thirds of men. It was not until the Representation of the People Act 1928 that women could vote at the same age as men.

⁶⁴ Coal Industry Commission Act 1919 s 1(f)

⁶⁵ Coal Industry Commission, vol II, *Reports and Minutes of Evidence on the Second Stage of Inquiry* (1919) Cmd 360, page x, recommendation LIX. nb other representatives would be chosen by the NMC to represent consumers, and suppliers.

⁶⁶ (1919) Cmd 360, page xiii, from Frank Hodges, Leo Money, Robert Smillie, Herbert Smith, RH Tawney and Sidney Webb, supporting proposals by Mr W. Straker, see pages 944 to 946, referring to Mr Henry H. Slesser’s bill.

⁶⁷ (1919) Cmd 360, page 922. The Bill is appended to the evidence of Mr Henry H. Slesser, counsel for the union, drafted on the recommendations of Mr W. Straker.

⁶⁸ (1919) Cmd 360, page xviii-xix (Arthur Balfour, RW Cooper, Sir Adam Nimmo, Sir Allan M Smith, and Evan Williams). cf page xxvi, Sir Arthur Duckham in a lone report proposed a minimum of two worker representatives on the board of directors itself. Coincidentally, this is what was achieved in Germany by the Aufsichtsratsgesetz 1922, the first precursor to today’s Mitbestimmungsgesetz 1976.

welfare, recreation and well being, and contained sections for elected pit committees at every mine.⁶⁹ These were only supposed to make recommendations to employers. By contrast, as R.H. Tawney had put it, mine workers felt that shareholder control for pecuniary gain 'by a comparatively small number of persons' was,⁷⁰

for ends and by means with regard to which they are not consulted. They believe that, in virtue of their practical experience, they can make important contributions to the program of their industry, and that these contributions are frequently not welcomed by the management today.

No doubt dejected at the failure of the nationalisation plan, the miners and the union did not take up the offer: they saw consultation committees as a sham. A few years later the miners changed their minds, but by then a less sympathetic government was in power, and it refused.⁷¹ Labour representation was also recommended for port authorities generally, and for Bristol dock workers in particular,⁷² and to administer the National Unemployment Insurance Scheme.⁷³

The development that probably came closest to significant reform was in the railways. In a Ministry of Transport command paper, the government proposed amalgamating the existing railway companies into six regional groups, each with its own board. The plan then said this.⁷⁴

The composition of the Board is considered to be of the greatest importance, and whilst in the past the directors of railway companies have all been appointed by the shareholders, the Government are of the opinion that the time has arrived when the workers, both official and manual workers, should have some voice in the management.

⁶⁹ Mining Industry Act 1920 ss 4 and 20; ss 7-17 were not put into effect.

⁷⁰ RH Tawney, 'The British Coal Industry and the Question of Nationalization' (1920) 35(1) Quarterly Journal of Economics 61, 104.

⁷¹ Recounted in W Milne-Bailey, *Wirtschaftsdemokratische Strömungen in England* (1928) 20-21, which states it is a translation from English (presumably with a title like 'Trends of Economic Democracy in England') but that does not seem to be published.

⁷² See W Milne-Bailey, *Trade Union documents* (1927) Sources 223 and 225. See also 228 on the Cotton Control Board (1917-1919).

⁷³ Unemployment Insurance Act 1920 s 17 and see Ministry of Labour, *Report on Nation Unemployment Insurance* (1923) 42 (884).

⁷⁴ Ministry of Transport, *Outline of Proposals as to the Future Organisation of Transport Undertakings in Great Britain and their Relation to the State* (1920) Cmd 787, 2.

It went on to propose that shareholders retain the right to appoint a majority, and on the other side ‘one-third might be leading administrative officials of the group, to be co-opted by the rest of the Board, and two-thirds members elected from and by the workers on the railway.’⁷⁵ But between the report and Royal Assent, this part was dropped.

The general view is the plan was dropped because of both employer reticence and division among trade union leaders, who thought worker participation needed to be coupled to nationalisation.⁷⁶ It also appears from a previously secret *Memorandum for the Cabinet by the Minister of Transport*, by Eric Geddes, that while the Labour Party supported the motion, the railway companies were ‘strongly opposed’, and traders were ‘officially silent’ but thought ‘introducing a new principle’ would have ‘far-reaching effects upon employers of labour generally.’⁷⁷ Attached to the memorandum is a draft Bill, where Schedule 2, paragraph 2(d) stated that one year after the Act, workers who had served seven years would elect 4 out of 21 directors. In the end the Railways Act 1921 brought in other elements of the settlement that were already in collective agreements. There were statutory work councils which had functions such as writing principles for wage setting, training and workplace suggestions, a centralised wage board, and the Railway Rates Tribunal got a labour representative.⁷⁸ Board level codetermination was no more.

Outside specific sectors, the general plan, while the Liberal party still led government, was to promote workplace participation voluntarily, at least on its face. The five short Whitley Reports from 1917,⁷⁹ however, envisaged a very limited set of objects. They were not based on a conviction that a right to participation derived from contribution to production, rather than a more amorphous view that workers were ‘affected’ by employers’ decisions. The goal was said to be ‘to secure co-operation by granting to workpeople a greater share in the consideration of matters affecting their industry’. This, it said, could ‘only be achieved by keeping employers and workpeople in constant touch.’⁸⁰

⁷⁵ (1920) Cmd 787, 3.

⁷⁶ See the debate generally, and in particular, James Wilson, Hansard HC Debs (30 May 1921) vol 142, [cols 652-654](#). Also, D Brodie, *A History of British Labour Law: 1867-1945* (Hart 2003) 177-179, citing PS Bagwell, *The Railwaymen: the history of the National Union of Railwaymen* (George, Allen & Unwin 1963) 410, ‘it will only require a little reflection to realise that the position of representative employees on the board of directors which were running the railways primarily for dividends and only secondarily for the public service would be untenable.’

⁷⁷ Railways Bill, *Memorandum for the Cabinet by the Minister of Transport* (March 1921) [CP 2749](#), 6-7.

⁷⁸ Railways Act 1921 ss 20-24 and 62-66, referring to (1917) Cd 8606, §16.

⁷⁹ Starting with the Reconstruction Committee, *Sub-Committee on Relations between Employers and Employed: Interim report on joint standing industrial councils* (1917) Cd 8606.

⁸⁰ (1917) Cd 8606, §14.

Whitley also eschewed the creation of general legal rights.⁸¹ Instead, under the Trade Boards Act 1918 sections 1(2) and 4(6), the Minister of Labour could establish 'trade boards' where a sector was not unionised or collective bargaining was inadequate 'for regulating the remuneration of employment'. The aim was to make employers and unions establish Joint Industrial Councils themselves, and if they refused, the Ministry would threaten to fix wages generally. This did not mean changing any company or business' board, nor even requiring councils be elected to assume management functions within a firm. Instead, it was overarching, nationwide committees that were composed of representatives from unions and employers. It was institutionalised collective bargaining.

Whitley's general model of 'voluntarism', backed by the Ministry of Labour's legal power to fix wages, worked so long as the Ministry was active. In the event that was around three years. While Lloyd George remained in office, the Ministry gave considerable assistance to unions to organise the workforce.⁸² But as it was becoming clear that the Conservative party would win the 1922 election, Sir George Cave chaired a review of the Ministry's activities. Whether or not there was some 'revival of the old class feeling', his Report recommended that the Ministry of Labour be cut. It argued that trade boards had gone beyond their original function, to regulate the sweated trades, and their focus should be reduced only to industries where wages were 'unduly low'.⁸³ Some joint industrial councils survived the 1920s, such as those in wool and building. Some workplaces, voluntarily, kept worker voice in company policy making, particularly on pensions or social programmes.⁸⁴ But generally the number of councils, and their power, diminished without the support of the Ministry.⁸⁵ People's voice at work fell back on and followed the fortunes of collective bargaining.

Meanwhile, there was a revival of enthusiasm for share based participation. After the War, the House of Lords made its preferences clear, in a decision on expulsion of a

⁸¹ (1917) Cd 8606, §21 'it may be desirable at some later stage for the State to give the sanction of law to agreements made by the Councils, but the initiative in this direction should come from the Councils themselves.'

⁸² KD Ewing, 'The State and Industrial Relations: 'Collective Laissez-Faire' Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1.

⁸³ Cave Committee, *Report to the Ministry of Labour of the Committee Appointed to Enquire into the Working and Effects of the Trade Board Acts* (1922) Cmd 1645, thus returning to a position slightly better than under the first Trade Boards Act 1909. It had, however, survived outright abolition in the Conservative and Liberal coalition's proposed programme of cuts: see the Geddes Report, *Committee on National Expenditure. First interim report of Committee on National Expenditure* (1922) Cmd 1581, at 141 ff.

⁸⁴ eg Bournville Works, *A Works Council in Being* (1922) LSE Archives HD5 118.

⁸⁵ See *Model Constitution and Functions of a Joint Industrial Council* (1961) Appendix I, 209, in Ministry of Labour, *Industrial Relations Handbook* (HMSO 1961) 24. 42 (3386).

union member. In *Amalgamated Society of Carpenters and Joiners v Braithwaite*, a group of workers were expelled from their union for joining a profit-sharing scheme of their employer, Lever Bros Ltd.⁸⁶ The union's rules were designed to hinder sham forms of workplace participation, penalising any involvement in 'a co-partnership system when such system makes provision for the operatives holding only a minority of the shares.' Their Lordships reversed a line of cases stating that the courts would not interfere in union affairs, and then inventively construed the union's rules to prevent the expulsion. While declaring that this had no influence upon their decision, Lord Buckmaster noted that the 'right to give and to withhold labour has on certain occasions unfortunately proved to be the only means of obtaining the redress of grievances' and suggested it may well be better if workers and employers' interests were not kept so apart.⁸⁷

Given their rhetoric, it seemed their Lordships supported the various kinds of profit-sharing and co-partnership plans that continually returned to Parliament. The first had been a Companies (Co-partnership) Bill in 1913, proposing that limited liability be contingent on giving workers shares.⁸⁸ Members of government continued to be interested, and reviews were conducted on how it might be promoted, knowing full well that share schemes usually led to workers gaining no actual voting rights.⁸⁹ Bills continued to be proposed through the 1920s and 1930s,⁹⁰ and in 1925 an MP called Noel Skelton coined a new term for this set of ideals. He favoured the progress of a 'property owning democracy', originally a reference to real property, but soon generalised in all respects.⁹¹ A Liberal industrialist named Alfred Mond caught some attention for a while with his proposals for more partnership and initiatives for share purchase,⁹² but it never came to a law.

In contrast, during the same period, Harold Laski, who had been closely involved

⁸⁶ [1922] 2 AC 440.

⁸⁷ [1922] 2 AC 440, 452.

⁸⁸ See Hansard HC Deb (7 May 1913) vol 52, [col 2032](#).

⁸⁹ See J Hilton, *Report on Profit Sharing and Labour Co-Partnership in the United Kingdom* (1920) Cmd 544, 44.

⁹⁰ eg Copartnership Bill 1925, see HC Deb (3 April 1925) vol 182 [cols 1754-94](#), and Profit Sharing Bill, see HC Deb (6 March 1931) vol 249 [cols 737-74](#).

⁹¹ Hansard HC Deb (26 March 1925) vol 182, [cols 773-776](#), 'the future of trade and employment in this country depends, first and foremost, upon a constant upholding of the principle of private enterprise and private property, and the great extension of the latter through the larger number of the people in this country. So far from believing that through any form of State control, far less of State ownership, you will get improved production, improved work, and improved conditions, in my judgment the real hope of this country and in particular the real hope of the working classes, lies in the development of what I venture to call a property-owning democracy.'

⁹² Representative of his views is a speech during a debate on the 'Conditions of the Working Classes', Hansard HC Deb (7 April 1925) vol 182, [cols 2169-2710](#).

with the Labour party, had also promoted the policy of giving half a company's board seats to representatives of managers and workers, to 'have equal power with the representatives of invested capital'. He also sought one vote per shareholder, regardless of size of shareholding.⁹³ This proposal, however, did not seem to square with what one may presume was the more basic aim he expressed, to 'prevent interference with the direction of an industrial enterprise by the loaners thereto of capital'.⁹⁴ Laski became increasingly controversial within his own party, and was eventually alienated when he remarked that violent overthrow of government might be needed if Labour did not win the 1945 election. The general result, when the first majority Labour government was elected to win the peace, was that it was not interested in share schemes nor, it seemed, codetermination.

(3) 'WHAT THE STATE HAS NOT GIVEN...'

Toward the end of the Second World War the Trades Union Congress and the Labour Party had a common objective to avoid a repeat of the post-World War One policies. First, the view had formed that Joint Industrial Councils had tried to do too much. Instead, the Wages Councils Act 1945 was passed to clarify the focus of councils as applicable to wage negotiations only, while allowing a court to make terms in collective agreements binding on all employers.⁹⁵ While collective bargaining remained central it could be said, as did Ernest Bevin, at the Second Reading, that the bedrock of the system was still to be 'the most priceless thing in this country, something which has carried us through the war without loss of our liberties, the great voluntary system of negotiation'.⁹⁶

Second, when Labour was elected in 1945, the Government generalised its nationalisation programme. However, in contrast to the post-World War One developments, worker codetermination was held to be unnecessary: a single channel would do. The TUC did in fact argue that workpeople had a right to 'participation in management', but also that boards of nationalised industries should be appointed according to their competence alone, even if union members might well merit strong consideration.⁹⁷ Thus, the worker participation they envisaged would be channelled through

⁹³ H Laski, *A Grammar of Politics* (George, Allen & Unwin 1925) republished by DA Reisman (ed) (Pickering & Chatto 1996) 479-480.

⁹⁴ Laski (1925) 113.

⁹⁵ O Kahn-Freund, 'The Wages Councils Bill' (1945) 8(1) *Modern Law Review* 68.

⁹⁶ Ernest Bevin, Second Reading of the Wages Councils Bill, *Hansard HC Deb* (16 January 1945) vol 407, cols 70-71

⁹⁷ TUC, *Interim Report on Post-War Reconstruction* (1944) 21-22.

four stages of representation: first from workers through unions, second through the Labour party, third through government, and fourth to the state owned enterprise that was the employer. Without being pushed, the Labour Party leadership was only prepared in the nationalisation legislation to allow references to looking at diverse candidates for directors, including people experienced in ‘the organisation of workers’, at most.⁹⁸ So firm was this view that when the gas industry underwent nationalisation, all worker directors were abolished. The 1896 South Metropolitan Gas Company’s plan, for one, had continued to allow a minority of employee representatives on the board. The reason for abolition said Minister for Fuel and Power, Hugh Gaitskill, was there were in any event ‘actually very few cases’ where ‘the employees or their representatives take an active part in managing the business.’⁹⁹

The result was a clearer separation than ever of the sphere of managers from the managed. One of the newest British labour lawyers, Otto Kahn-Freund was firmly supportive. A Berlin Labour Court judge who fled the Nazis, Kahn-Freund believed British labour law should be positively described as a system of ‘collective *laissez faire*’. On this view collective agreements were not binding because it was intended by the parties, and so workplace regulation was in its basic components voluntary. Labour law was meant to be more labour than law. This was normatively defensible, thought Kahn-Freund, to preserve union independence from employers, and union autonomy from the state. ‘What the State has not given,’ said Kahn-Freund, ‘the State cannot take away’.¹⁰⁰

On the other side, Winston Churchill, in his leadership of the Conservatives, and at the Party conference of 1946 adopted the Skelton slogan of the property owning democracy, together with familiar themes of promoting partnership at work and profit-sharing.¹⁰¹ After his re-election in 1951, occasional debate continued,¹⁰² but no substantive legislation was passed. Union membership was at an all time high, and so if people did

⁹⁸ eg Coal Industry Nationalisation Act 1945 s 2(3).

⁹⁹ Gas Act 1948. See also Mr Hugh Gaitskill, Minister for Fuel and Power, Second Reading, HC Deb (10 February 1948) vol 447 [cols 218-334](#).

¹⁰⁰ O Kahn-Freund, ‘Labour Law’ in M Ginsberg, *Law and Opinion in England in the 20th Century* (1959) 215, 244.

¹⁰¹ See W Churchill, Speech to the Conservative Party Conference (5 October 1946) ‘We oppose the establishment of a Socialist State, controlling the means of production, distribution and exchange. We are asked, ‘What is your alternative?’ Our Conservative aim is to build a property-owning democracy, both independent and interdependent. In this I include profit-sharing schemes in suitable industries and intimate consultation between employers and wage-earners. In fact we seek so far as possible to make the status of the wage-earner that of a partner rather than of an irresponsible employee... We are opposed to the tyranny and victimisation of the closed shop. Our ideal is the consenting union of million, of free, independent families and homes to gain their livelihood and to serve true British glory and world peace.’

¹⁰² Hansard HC Deb (28 January 1955) vol 536, cols 563.

have more voice in their workplaces now, it was not because of shares, but collective bargaining. The drawback was the growing discontent with the incidence of industrial stoppage. It threatened to unravel the uneasy post-war consensus, especially as division spread to the Labour Party.¹⁰³

Labour returned to power in 1964, and shortly afterwards the TUC firmed its stance on involvement in management. In its submission to a Royal Commission on Trade Unions, chaired by Lord Donovan, the TUC suggested that public companies should begin introducing worker directors, and it would be desirable to have discretionary legislation 'to allow companies to make provision' for union representatives on boards of directors.¹⁰⁴ While legislation was plainly needed for nationalised bodies, in fact company law required no amendment, unless the goal was to change default rules, make possibilities explicit, or make changes easier. Individual company constitutions ordinarily allowed anybody to be appointed to a board by the existing board. Moreover any company's articles of association could be amended by a 75 per cent vote of shareholders to require, for example, a certain proportion of employee representatives, or indeed a certain portion of votes in the general meeting for workers. Both could be secured by collective agreement. What the TUC's submissions suggest is that although trade unions were reaching an historical high point in their bargaining power and political influence, a culture of avoiding involvement in management constrained action. This was reflected by the Labour Party's own policy document in 1967, which envisaged trade unions being an integrated 'single channel of worker representation'.

The Donovan Report reflected some of the TUC's uncertainty.¹⁰⁵ Seven of the twelve members argued they could not recommend worker directors because their duties would conflict with the obligation to promote the success of the company. Though this seems to have been a very misguided understanding of company law,¹⁰⁶ the seven added that a worker director might find their situation impossible if he or she had to recommend

¹⁰³ In a symbolic overview, see the White Paper, *In Place of Strife: A Policy for Industrial Relations* (1969) Cmnd 3888, which proposed among other things the requirement for a ballot of members before a strike.

¹⁰⁴ Trades Union Congress, *Trade Unionism* (1966) §290.

¹⁰⁵ Lord Donovan, *Royal Commission on Trade Unions and Employers' Associations* (1968) Cmnd 3623, 1997.

¹⁰⁶ *Re Smith and Fawcett Ltd* [1942] Ch 304, directors had to 'exercise their discretion bona fide in what they consider - not what a court may consider - is in the interests of the company, and not for any collateral purpose.' This was codified in the Companies Act 2006 s 172. If another result appeared possible in 1968, it seems spurious that the Donovan Commission could not recommend a simple clarification of the law on directors duties along with worker directors, given that their job was in fact to recommend law reform. More likely, the majority were making up an extra excuse, because their real concern was the distraction point.

redundancies, and anyway it would distract from reform of collective bargaining. Otto Kahn-Freund was on the Commission, and probably one of its most influential members. On this issue, he was with a minority, but he only seemed able to voice a reserved endorsement. His view was that worker directors would probably produce no ‘immediate and dramatic results’ but that experiments were ‘desirable’ and so they should progress ‘on a voluntary basis’.¹⁰⁷ The Labour Party’s policy mirrored this: though it was silent on private industry, they had committed to worker directors in nationalised industries.¹⁰⁸ By contrast, the Liberal Party had committed to a comprehensive representation system, across the private sector, that would have meant employees had a quarter of votes in a company’s general meeting. However, this was linked to a requirement that employees purchased shares: if workers purchased enough shares, seats on a board would be guaranteed.¹⁰⁹

The first experiments which took place were in steel.¹¹⁰ The Iron and Steel Act 1967 expressly allowed worker directors to be installed, in consultation with the government,¹¹¹ and from 1968 the plan was carried through. The model was necessarily ‘consociationalist’, so that a director represented workers as a distinct interest group, rather than being elected to represent all interests together.¹¹² The TUC provided a shortlist from which the corporation’s chairman made a selection, but initially the directors sat merely on divisional boards, not the board of the whole corporation.¹¹³ In 1977 the government appointed six trade unionists to the corporation’s main board, though this was still a minority. Experience was mixed, largely because the union nominated directors remained separated from management functions.

Nevertheless, the Industry Act 1975 created a statutory aspiration that the National Enterprise Board, originally envisaged to extend state ownership, would start ‘promoting industrial democracy in undertakings which the Board control’.¹¹⁴ A similar statutory aspiration was created for companies falling under British Aerospace and British

¹⁰⁷ Donovan Report (1968) Cmnd 3623, §1004, Lord Collison, Professor Kahn-Freund and Mr. Woodcock.

¹⁰⁸ Labour Party, *Industrial Democracy* (1967) §92.

¹⁰⁹ Liberal Party, *The Report of the Industrial Partnership Committee: Partners at Work* (1968).

¹¹⁰ See generally M Gold, ‘Worker directors in the UK and the limits of policy transfer from Europe since the 1970s’ (2005) 20 *Historical Studies in Industrial Relations* 29, with further proposals that did not come to fruition.

¹¹¹ Iron and Steel Act 1967, Sch 4, Part V.

¹¹² The term ‘consociationalism’ has a considerable body of literature around it in political theory and constitutional law. It refers to (very troubled) systems where ethnic, racial or linguistic groups are reserved seats in Parliament by virtue of their status. See P Toit, ‘Consociational Democracy and Bargaining Power’ (1987) 19(4) *Comparative Politics* 419 and S Issacharoff, ‘Constitutionalizing Democracy in Fractured Societies’ (2004) 82 *Texas Law Review* 1861.

¹¹³ P Brannen, ‘Worker directors: an approach to analysis. The case of the British Steel Corporation’ in C Crouch and FA Heller, *Organizational Democracy and Political Processes* (Wiley 1983).

¹¹⁴ Industry Act 1975 s 2(2)(b).

Shipbuilders when the industries were identified for nationalisation in 1977.¹¹⁵ One of the effects was that a few managements of the still-private companies instituted their own form of employee participation, in the hope it might stall nationalisation. Inevitably, the actual influence by the employee representatives was restricted in these plans.¹¹⁶ Little else could come of these vague statutory exhortations in such a short time. Similarly the Post Office Act 1977 enlarged the board that controlled the Royal Mail and Britain's Telecommunications network from twelve to nineteen members, to include seven union representatives.¹¹⁷ Although this was opposed by the previous directors, it only lasted two years, and the union nominees received little training,¹¹⁸ their experience appeared harmonious enough to be complimented in the 1979 annual report.¹¹⁹

The nationalisation experiments were accompanied by heated debate about a general codetermination programme, which never quite came into effect. The UK's accession to the European Economic Community in 1973 meant it had joined continent-wide discussion about codetermination, at least where social democrat governments were elected.¹²⁰ However, leading representatives in the Labour Party seemed to be in two minds about the issue, unsure whether it was a distraction from collective bargaining, or whether any proposal would be enough.¹²¹ The Bullock Report proposed to extend union directors to half of every company board, with independent representatives in the middle appointed by government, a $2x + y$ formula.¹²² A Minority Report argued that employee representatives should only sit on a separate board, and that employees be allowed to elect representatives directly, rather than the union choose. The government's response, in its 1978 White Paper, was to instead propose a two-tier board structure where unions selected a minority of directors in the supervisory board.¹²³ The Confederation of British Industry,

¹¹⁵ Aircraft and Shipbuilding Industries Act 1977 s 2(8) obligation 'to promote industrial democracy in a strong and organic form within the undertaking'.

¹¹⁶ E Chell, 'Worker Directors on the Board: Four Case Studies' (1980) 2(6) Employee Relations 1, discussing the Bristol Channel Ship Repairers.

¹¹⁷ Post Office Act 1977 s 1. Hansard HL Deb (14 July 1977) vol 385, cols 981-97, Lord Winterbottom, Second Reading.

¹¹⁸ E Batstone, A Ferner and M Terry, *Unions on the board: an experiment in industrial democracy* (Basil Blackwell 1983) 19-21 and chs 4-6.

¹¹⁹ Noted by Viscount Trenchard, Hansard HL Deb (12 December 1979) vol 403, [cols 1158-66](#).

¹²⁰ Beginning with the Proposal for a Fifth Directive on the Structure of Societies Anonymes, 5 Bulletin European Comm. (1 Supp No 10, 1972).

¹²¹ cf Tony Benn, 'Takeovers and Mergers', Hansard HC Deb (24 November 1972) vol 846, [cols 1813](#) (apparently 'not so enthusiastic' about codetermination). Tony Benn, Companies Bill, Hansard HC Deb (17 January 1974) vol 867, [cols 1034](#) (codetermination was not enough).

¹²² Alan Bullock, *Report of the committee of inquiry on industrial democracy* (1977) Cmnd 6706.

¹²³ *White Paper on Industrial Democracy* (May 1978) Cmnd 7231. See also Lord Peart, Hansard HL Deb (23 May 1978) vol 392, [cols 848-57](#).

meanwhile, promised ‘unremitting hostility’ to union members sitting on boards.¹²⁴ And indeed, the proposal was not a gradual change.

Where was the support for codetermination among the unions and labour lawyers? Most unions were generally supportive, but held strongly to the idea that they should remain the single channel for employee representation. They had a variety of incompatibly personalised views on what the exact structure of boards should be. A number of prominent unions remained opposed to the plans, because the tacitly the plans endorsed the existence of a private sector.¹²⁵ Among academics, there were similar splits. On the one hand there was the conviction that codetermination, even on a consociationalist model, was the best way to increase accountability and reduce the numbers of strikes.¹²⁶ Kahn-Freund, however, could not bring himself to support the plans. Though ‘a personal observation’, he could not forget the Weimar Republic’s experience with its own ‘feeble and half-hearted scheme’, noting especially the ‘measure of legalism which may be excessive’.¹²⁷ A scepticism of the law, and a mistrust of management, obscured its positive use as tool for social progress. Added to divisions in the Labour cabinet about the role of unions, and the looming winter of discontent,¹²⁸ this culture of abstention meant divided support for codetermination in Britain. In the end, ‘what the state had not given’ the UK was a codetermination law. This did not mean there was nothing the state could take away.

(4) SHARING SUCCESS?

When Margaret Thatcher took power in 1979, experiments with industrial democracy in nationalised industries were ended. The worker directors at the Royal Mail were swiftly retrenched, and the promotion programmes put to a halt.¹²⁹ Collective bargaining was also ended for a large majority of UK workers, as ten major pieces of legislation whittled away trade union power and membership. If law reform could achieve so much, the description of UK labour law as a system of collective *laissez faire* did not capture how things worked.

¹²⁴ CBI, *In Place of Bullock* (May 1977).

¹²⁵ PL Davies and M Freedland, *Labour Legislation and Public Policy* (Clarendon 1993) 403.

¹²⁶ eg PL Davies and KW Wedderburn, ‘The Land of Industrial Democracy’ (1977) 6(1) ILJ 197-211. The TUC had lent its official support to codetermination with the publication, TUC, *Industrial Democracy* (1973) 34-36.

¹²⁷ eg O Kahn Freund, ‘Industrial Democracy’ [1977] 6 ILJ 65. Contrast E McGaughey, ‘The codetermination bargains: the history of German corporate and labour law’ (2017) [23\(1\) Columbia Journal of European Law 135](#).

¹²⁸ B Clift, A Gamble and M Harris, ‘The Labour Party and the Company’ in JE Parkinson, A Gamble and G Kelly, *The Political Economy of the Company* (Hart 2000) ch 3, 76-80.

¹²⁹ The justification for its termination was that it was unnecessary, according to Sir Keith Joseph, Hansard HC Deb (12 December 1979) vol 975, cols 1303-12. E Batstone et al, *Unions on the board: an experiment in industrial democracy* (1983).

When government stopped promoting union membership, and turned hostile, it was clear that the union movement's successes were not solely attributable to independent action in a voluntaristic economy. The two most significant legal changes were the same points, which had divided the Royal Commission of 1869:¹³⁰ abolishing secondary action and the closed shop.¹³¹ There was a reform to company law, that directors should have regard to 'the interests of the company's employees in general, as well as the interests of its members'.¹³² But this proved unenforceable, a paper duty, not least because it was very difficult to conceive how *ad hoc* court judgments could promote employee-friendly conduct among directors.¹³³

Business, represented by the Institute of Directors appeared to strike a conciliatory tone, that 'employee involvement activities can... result in improved performance, efficiency and competitiveness.'¹³⁴ However, instead of genuine employee participation, the government said it was interested in employee 'involvement'. That was,¹³⁵

the need to encourage increased employee involvement stressing in particular greater consultation and information, and the promotion of share-ownership and profit-sharing.

Indeed, the government's privatisation plans for state owned industry involved employee share ownership schemes, probably in part to dilute worker opposition. For example, under the Transport Act 1985 the country's buses were privatised, and many councils, especially those with Labour leaderships, instituted share schemes. Giving drivers and bus workers ownership was seen by some councils as a way to protect against asset stripping, and reduction of services or wages.¹³⁶ However, in a dramatically short space of time, employees sold on their stakes, and so lost any voice they had, while the owners of shares

¹³⁰ See *Eleventh and Final Report of the Royal Commissioners appointed to Inquire into the Organization and Rules of Trades Unions and Other Associations* (1868-1869) Parliamentary Papers vol xxxi, page xxiv.

¹³¹ Employment Act 1980 and Employment Act 1988.

¹³² Companies Act 1980 s 46 and Companies Act 1985 s 309.

¹³³ cf JE Parkinson, *Corporate Power and Responsibility* (Clarendon 1994) 134, 'unlike the market and market-linked devices, [directors' duties cannot] create a more positive motivational environment. They lay down minimum standards, and do not as such provide an incentive... to achieve top-quality performance.'

¹³⁴ Institute of Directors, 'Employee Involvement' Guide to Boardroom Practice No. 3 (London, 1983) 5.

¹³⁵ 'Chronicle: Industrial Relations in the United Kingdom' (1983) 21(3) *British Journal of Industrial Relations* 401, 406.

¹³⁶ A Pendleton, J McDonald, A Robinson and N Wilson, 'Employee Participation and Corporate Governance in Employee-owned Firms' (1996) 10(2) *Work, Employment and Society* 205-226.

tended to concentrate.¹³⁷ On the other hand, during Major's Conservative government, the first steps were taken toward statutory voting rights for people in pension schemes.¹³⁸ This codified practices in collective agreements.¹³⁹ It resulted from an extensive, and carefully thought through framework by Roy Goode, the country's leading commercial lawyer: pension codetermination was written into law in 1995.¹⁴⁰

Other political parties kept a commitment to employee participation in various forms for a while. The new Social Democrat Party proposed the implementation of worker codetermination in a similar fashion to the White Paper of 1978,¹⁴¹ while the Labour Party remained committed to board level employee representation throughout the 1980s. In 1985 it said this would make 'A New Britain'.¹⁴² However, in 1994 a new leadership preferred to say, merely, that 'non-executive directors of companies should recognise that there are other stakeholders in the future of the company than shareholders.'¹⁴³ More attention was given to clause IV of the Labour Party's constitution, redrafted to eliminate the reference to nationalisation.¹⁴⁴ In 1997, one of the new Labour government's first acts was to install a union representative on the board of British Rail,¹⁴⁵ and through the EU, the Information and Consultations Directives enabled elected work councils to demand negotiations before major economic changes.¹⁴⁶ These complemented existing laws on health and safety, and collective redundancies.¹⁴⁷ But the next step, that work councils might have binding rights to participate on specific issues, was not yet taken. There was also a new Directive on

¹³⁷ L. Trehwhitt, 'Employee Buyouts and Employee Involvement: A Case Study of Investigation of Employee Attitudes' (2000) 31(5) *Industrial Relations Journal* 451.

¹³⁸ As mentioned above, in the Pensions Act 1995. See now the Pensions Act 2004 ss 241-243.

¹³⁹ e.g. J Hyman and T Schuller, 'Occupational pension schemes and collective bargaining' (1984) 22(3) *BJIR* 289.

¹⁴⁰ Roy Goode, *Pension Law Reform* (1993) Cm 2342, para 4.5.19 and see generally E McGaughey, *Participation in Corporate Governance* (2014) ch 6(1)(b).

¹⁴¹ Social Democratic Party, *Industrial Relations: Trade Union Reform* (1983) 2.

¹⁴² See TUC – Labour Party Liaison Committee, *Partners in Rebuilding Britain* (1983) 10. Also, *Jobs and Industry. A New Partnership. A New Britain* (1985) 21.

¹⁴³ Labour Party, *Winning for Britain* (1994) 11.

¹⁴⁴ Clause IV now reads: 'The Labour Party is a democratic socialist party. It believes that by the strength of our common endeavour we achieve more than we achieve alone, so as to create for each of us the means to realise our true potential and for all of us a community in which power, wealth and opportunity are in the hands of the many not the few, where the rights we enjoy reflect the duties we owe, and where we live together, freely, in a spirit of solidarity, tolerance and respect.'

¹⁴⁵ This was pursuant to powers in the Transport Act 1968 s 38. See 'Prescott to Put Worker Director on Board of BR' (6 October 1997) *Guardian*.

¹⁴⁶ See the Information and Consultation of Employees Regulations 2004 under the Information and Consultation of Employees Directive [2002/14/EC](#) and the Transnational Information and Consultation of Employees Regulations 1999 under the European Works Council Directive [2009/38/EC](#).

¹⁴⁷ Health and Safety Directive 89/391/EC art 11(2) and the Health and Safety at Work etc Act 1974 s 2. Trade Union and Labour Relations (Consolidation) Act 1992 ss 188-196, under the Collective Redundancies Directive 98/59/EC. Also the Transfer of Undertakings (Protection of Employment) Regulations 2006 under the Transfer of Undertakings Directive 2001/23/EC.

Employee Involvement in European Companies,¹⁴⁸ but any employee involvement would be negotiated from a company's existing position on workplace representation. In the UK private sector that usually meant none, unless trade unions would begin to collectively bargain for votes in corporate governance.

After the Conservative led coalition succeeded at the 2010 election, there were three minor developments. First, a general philosophy was summed up in a 2012 government paper, entitled *Sharing Success: The Nuttall Review of Employee Ownership*. 'Employee share ownership,' wrote the author Graeme Nuttall, 'is a great idea.'¹⁴⁹ What did this mean? It would be a priority to promote greater employee share ownership by awareness raising exercises and unspecific deregulatory measures.¹⁵⁰ Second, in the Postal Services Act 2011 the government made clear its intention to sell off at least part of the Royal Mail, and in September 2013 it was announced that part of the shares would be allocated to employees. A deep seated belief, that the appropriate method of participation in the economy was buying shares, seemed to remain. Third, the Growth and Infrastructure Act 2013, section 31, enabled employees to sell rights, in return for company shares, that are unprotected by EU law minima: mainly fair dismissal and paid time off to care for children. Few took this up,¹⁵¹ and that seemed to be rational. Less than ten years before, employees at the US energy firm Enron were encouraged to invest an average of 62.5 per cent of their retirement savings into Enron shares, and lost everything.¹⁵² Share schemes are imprudent: lacking diversification, with no guarantee of meaningful voting rights.

On the other hand, in universities the rights of staff to vote in governance was alive as ever. The government briefly announced that it intended to abolish this right, but withdrew its plans after vocal protests by the Universities and College Union.¹⁵³ One

¹⁴⁸ European Company Regulation 2157/2001/EC and Employee Involvement Directive 2001/86/EC. PL Davies 'Workers on the board of the European Company?' (2003) 32 Industrial Law Journal 75.

¹⁴⁹ G Nuttall, *Sharing Success: The Nuttall Review of Employee Ownership* (July 2012) 5.

¹⁵⁰ *Sharing Success: The Nuttall Review of Employee Ownership* (2012) 5, 'Employee ownership is a great idea. It means a significant and meaningful stake in a business for all employees.' See also 60-69, discussing template ESOP models, exemptions from perpetuities rules, internal share market rules, and possibly a new legal entity.

¹⁵¹ For additional problems related generally to employment rights, see J Prassl, 'Employee Shareholder 'Status': Dismantling the Contract of Employment' (2013) 42(4) ILJ 307, noting at 337 that there had at the time been under 10 inquiries of interest by business.

¹⁵² See PJ Purcell, 'The Enron Bankruptcy and Employer Stock in Retirement Plans' (11 March 2002) CRS Report for Congress, and JH Langbein, SJ Stabile and BA Wolk, *Pension and Employee Benefit Law* (4th edn Foundation 2006) 640-641.

¹⁵³ See currently Education Reform Act 1988, s 124A and Sch 7A, para 3, inserted by Further and Higher Education Act 1992 s 71(4) and Sch 6, and 'Government withdraws college governance reforms' (3 November 2011) [UCU](#).

example of British codetermination endured after all. A new Trades Union Congress leadership had become strongly convinced of the need to ‘take up every chance to re-shape economic relationships’, with new ‘models of corporate governance that empower all stakeholders... worker and union involvement in corporate decision making’.¹⁵⁴ At the 2015 general election, a new Labour Party took on the proposal of Lord Wedderburn,¹⁵⁵ and committed to legislation for worker directors on the boards, in director remuneration committees.¹⁵⁶ Details aside, it was historically apparent that the labour movement, in politics and unions, had become committed to multiple channels of voice – ‘worker and union involvement’ – a new constitutional conception of the company. Perhaps most astonishingly, in her bid to become Prime Minister after the ‘Brexit’ poll, Theresa May pledged the Conservative Party to legislate to enable worker representation on company boards,¹⁵⁷ and both the Institute of Directors and the Trades Union Congress signalled their endorsements. This was then clarified, at a CBI speech, to be ‘not about mandating’ codetermination.¹⁵⁸ In the necessary, if predictable, media rough and tumble, this was instantly called a ‘u-turn’ and ‘betrayal’,¹⁵⁹ but a historical view might lend more optimism. After all, the Pensions Act 1995 first put member-nominated pension trustees into law with an opt-out, but this was soon firmed into a full duty.¹⁶⁰ Indeed, one model that many will look to, of German codetermination, was re-codified in 1951 and 1952 into law by conservatives, and strengthened in 1976 by all-party consensus.¹⁶¹ Developments today do suggest Britain had finally stopped ‘waiting for a political consensus [for] a fair day’s wage through votes at work [to become] central to every government’s labour policy.’¹⁶²

Reflecting its status as an enterprise serving the public interest, and where markets persistently fail, there is also a role for government representation and representation of the student body. In the National Health Service there is also staff codetermination of a kind, although it is too early to say what exactly will survive after the massive overhaul under the Health and Social Care Act 2012.

¹⁵⁴ F O’Grady, *Attlee Memorial lecture* (26 April 2013).

¹⁵⁵ KW Wedderburn, *The Future of Company Law: Fat Cats, Corporate Governance and Workers* (IER 2004)

¹⁵⁶ *Britain Can Be Better: The Labour Party Manifesto 2015* (2015) 21.

¹⁵⁷ J Pickard, ‘Theresa May vows corporate crackdown on ‘privileged few’ (10 July 2016) Financial Times, and ‘Theresa May vows to put Conservatives ‘at the service of working people’ (11 July 2016) Herald Scotland.

¹⁵⁸ See ‘Speech to the CBI’ (21 November 2016) politicshome.com.

¹⁵⁹ e.g. ‘The Guardian view on workers’ representation: May’s U-turn is a betrayal’ (21 November 2016) [Guardian](http://www.guardian.co.uk).

¹⁶⁰ Pensions Act 1995 ss 16-21 and Pensions Act 2004 ss 241-243 and on the implications, see E McGaughey, ‘Does Corporate Governance Exclude the Ultimate Investor?’ (2016) [16\(1\) Journal of Corporate Law Studies](http://www.journals.cambridge.org) 221.

¹⁶¹ E McGaughey, ‘The codetermination bargains: the history of German corporate and labour law’ (2017) [23\(1\) Columbia Journal of European Law](http://www.journals.cambridge.org) 135.

¹⁶² cf E McGaughey, ‘All in ‘It’ Together: Worker Wages Without Worker Votes’ (2016) [27\(1\) King’s Law Journal](http://www.kingslawjournal.com) 1, 9, ‘We are still waiting for a political consensus that a fair day’s wage through votes at work must be central to every government’s labour policy.’

3. CONCLUSIONS

Does the UK have a ‘single channel’ for a voice at work, and is it committed to an ‘adversarial’ conception of the company? No. The stark truth, in most workplaces, is that people’s voice at work through the collective bargaining ‘channel’ has been put on mute. But also, history cautions against overplaying a single channel narrative. Through the 20th century votes at work operated on the ports, in gas, steel, post and buses, spanning private and public enterprises.¹⁶³ The view that more codetermination has not yet emerged because of a commitment to an adversarial model of companies also seems overstated. Instead, there was uncertainty in the labour movement because of a rival constitutional conception of a company, demanding investment of property for votes. Ironically, the most enduring model of votes at work, as of right, has been at universities: the forgotten governance structures of corporations where people writing most about the ‘single channel’ worked. As social scientists, we sometimes forget we are, not just observers, but participants.

The question remaining is, in light of the rich history of experiment and debate, are there any significant barriers to a coherent structure for votes at work in Britain? More and more people know that the ‘director-centred’ model of company law¹⁶⁴ is probably the worst of all worlds. But the monopolisation of corporate governance by shareholders is not optimal either.¹⁶⁵ The moral argument in favour of hierarchical workplaces usually began with a formalist view that a work relationship is an obligation, not proprietary.¹⁶⁶ Investing property in a company entitled you to a vote. Investing labour in a company did not.¹⁶⁷ But a property-obligation distinction does seem less relevant for claims to workplace participation today, as legal reasoning has shifted toward functional over formal analysis.¹⁶⁸ Similarly, the economic theory that investments of capital are more ‘at hazard’ than investments of labour in insolvency seems very dubious after repeated experience of

¹⁶³ cf H Collins, *Employment Law* (Clarendon 2010) ch 6, 134-5.

¹⁶⁴ See M Lipton and W Savitt, ‘The Many Myths of Lucian Bebchuk’ (May 2007) 93(3) *Virginia Law Review* 733, arguing Bebchuk would ‘discard the management concepts of U.S. corporate law that have nurtured the most successful economy in the world... the director-centred Delaware way has long served the national economy well...’ Three months later, Lehman Bros closed its sub-prime mortgage department, and the year after, it was insolvent.

¹⁶⁵ Clift, Gamble and Harris (2000) 53. AA Berle and GC Means, *The Modern Corporation and Private Property* (Transaction 1932) 311-2.

¹⁶⁶ See part 2(1) above.

¹⁶⁷ A phrase aptly used by R Goode, *Principles of Corporate Insolvency* (2005) 44, ‘A third is the interest [in corporate insolvencies] of the workforce in preserving its investment of labour, expertise and loyalty to the enterprise’.

¹⁶⁸ cf W Njoya, *Property in work: The employment relationship in the Anglo-American firm* (Ashgate 2007) who makes a cogent case that (if it had to be regarded as a necessary step) the law ought to recognise labour as generating proprietary entitlements. This argument is careful to select which ‘sticks in the bundle’ of property rights it wishes to allocate to workers: for instance it does not envisage a right to buy and sell one’s job.

financial crisis.¹⁶⁹ Both investments entail risks of present and future loss, and few people think that the personal and structural risks of unemployment are more benign than losses in a diversified share portfolio.¹⁷⁰ The view that shareholding institutions should continue to monopolise corporate governance is giving way to a growing moral consensus,¹⁷¹ that anyone who makes a contribution to production should have a proportionate voice.¹⁷²

Then there is the old ‘pro-capital’ argument, that votes at work might damage productive efficiency, or hamper enterprise. Sometimes it was said that workers are just not expert enough, and sometimes it is said that too many interests on a board will lead to conflict and sclerosis.¹⁷³ This contention is tempered by behavioural evidence, qualitative research, and increasingly sophisticated quantitative data on long-run efficiency of workplace participation rights.¹⁷⁴ The counter-proposition – that codetermination damages enterprise – has no credible empirical evidence behind it at all. When everyone is treated fairly, everyone is more productive. Indeed, proportionate voting rights for people at work limits the propensity for managerial agency costs. It prevents those with structurally unequal bargaining power from engaging in ‘negligence and profusion’ that always exists when some can unjustly enrich themselves from other people’s labour.¹⁷⁵

Finally, history shows there was a (supposedly) ‘pro-union’ argument against votes at work: that it might spell the death of trade unions, either because unionists get into bed with management, or codetermination would operate as a replacement for collective bargaining. These old speculations were always doubtful, because votes at work were

¹⁶⁹ See OE Williamson, *Economic Institutions of Capitalism* (Simon and Schuster 1985) 304. Contrast E Warren, ‘Bankruptcy Policy’ (1987) 54 University of Chicago Law Review 775.

¹⁷⁰ See generally E McGaughey, ‘Ideals of the Corporation and the Nexus of Contracts’ (2015) [78\(6\) MLR 1057](#).

¹⁷¹ On workers providing capital, E McGaughey, ‘Member nominated trustees and corporate governance’ ([26 June 2013](#))

¹⁷² Examples include S Deakin, ‘The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise’ (2011) 37 Queen’s LJ 339 and TA Kochan and SA Rubinstein, ‘Toward a Stakeholder Theory of the Firm: The Saturn Partnership’ (2000) 11(4) Organizational Science 367, 369.

¹⁷³ JCD Zahn, *Wirtschaftsführertum und Vertragsethik im neuen Aktienrecht* (Walter de Gruyter & Co 1934) 15, DF Vagts, ‘Reforming the “Modern” Corporation: Perspectives from the German’ (1966) 80 Harvard LR 23, 52–53 and H Hansmann, *The Ownership of Enterprise* (HUP 1996).

¹⁷⁴ On behavioural evidence, see E McGaughey, ‘Behavioural Economics and Labour Law’ (2014) LSE Legal Studies Working Paper [No. 20/2014](#). On qualitative research, see T Schuller and J Hyman, ‘Trust Law and Trustees: Employee Representation in Pension Schemes’ (1983) 12 ILJ 84, 91–93. Viscount Trenchard, Hansard HL Deb (12 December 1979) vol 403, [cols 1158–66](#). On preliminary quantitative data results, see J Armour, S Deakin, P Lele and M Siems, ‘How do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection’ (2009) 57(3) American Journal of Comparative Law 579, and the new dataset for 117 countries in see Z Adams, L Bishop and S Deakin, *CBR Labour Regulation Index: Dataset of 117 Countries* ([Centre for Business Research, 2016](#)).

¹⁷⁵ cf A Smith, *The Wealth of Nations* (Meuthen & Co 1776) [Book I, ch 8](#), §12 (on distribution of wealth enabling the stronger to hold out longer) and Book V, ch 1, [§107](#) (on negligence and profusion with other people’s money), JS Mill, *Principles of Political Economy* (1848) Book V, ch XI, §§8–12 (on collective action problems), WS Jevons, *Theory of Political Economy* (3rd edn Macmillan 1888) ch 4, §74 (on information asymmetry).

themselves a collective bargaining objective: not a substitute but a complement. As general workplace participation laws spread across developed democratic countries, it seems increasingly likely that the labour movement will keep pushing for collective agreements, and legal codification, to enshrine the right to vote in enterprise constitutions. This is technically simple. A percentage of employee votes can be reserved in annual general meetings, a minimum number of employee representatives can be reserved on a board of directors, or both.¹⁷⁶ In the 21st century, the old voluntarist myth is dead, and the arguments for shareholder monopolisation and the ‘single channel’ have diminished. People want ‘democracy and social justice.’¹⁷⁷

¹⁷⁶ Under CA 2006 [ss 112-3](#), a member is whoever is on the register of members, and is presumed to have a vote ([s 284](#)). There is no need for a member to hold shares. See further G Morse (ed), *Palmer's Company Law* (2016) 7.002 and 7.004. In the Model Articles, [Sch 3](#), a new para 34(2) could read, for example, ‘The company’s employees and workers shall be registered as members and be entitled to 30 per cent of the total votes in the general meeting, on a one person, one vote basis.’ As a model for board organisation, in Sweden the Board Representation (Private sector employees) Act 1987 ([SFS 1987:1245](#)) s 4 requires three employee representatives in companies with over 2000 staff on a single-tier board. Among shareholders, elected pension funds also tend to influence directors to ally with employee representatives.

¹⁷⁷ L Brandeis, ‘The Living Law’ (1916) [10 Illinois Law Review 461](#).